## National Labor Relations Board Weekly Summary



# of NLRB Cases

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Jackson Hospital Corp. d/b/a Kentucky River Medical Center (9-CA-37734, et al.; 354 NLRB No. 42) Jackson, KY, July 9, 2009. The Board affirmed, with some modified rationale, the administrative law judge's determinations regarding discriminatee Melissa Turner's eligibility for reinstatement and backpay. The Board primarily addressed the effect of Turner's post-discharge felony drug conviction, quitting of an interim job, and extended medical leave. [HTML] [PDF]

Turner's conviction for soliciting a controlled substance by fraud was based on her having visited a hospital and asked for Demerol to treat an alleged toothache, while lying about having sought treatment earlier that day at a different hospital, where she was prescribed Percocet. The Board held that the Respondent failed to prove its assertion that Turner's conviction (or the circumstances underlying it) would have caused the Respondent to lawfully discharge her. In so concluding, the Board relied on evidence that the Respondent had not fired other employees despite their felony drug convictions or substance abuse problems. Regarding Turner's quitting her interim employment at Gram Resources, the Board found that the judge appropriately considered the conflicting evidence regarding Turner's reasons for quitting and relied on credibility in concluding that Turner's decision to quit was reasonable and thus did not disqualify her from backpay. The Board upheld the credibility resolution. Finally, the Board found that the Respondent failed to prove its assertion that it would have lawfully discharged Turner, as her interim employer at the time did, for her 8-month medical leave during and after a difficult pregnancy. Although the Respondent sought remand for findings on this issue because the judge failed to address it, the Board concluded that the evidence – consisting of the Respondent's written leave policy and its former CEO's uncontested testimony about the operation of the policy – permitted the Board to resolve the matter itself and avoid the delays inherent in remand. The Board found that the former CEO's testimony did not resolve ambiguities in the Respondent's written leave policy regarding extensions of FMLA leave and the possibility of supplementing exhausted FMLA leave with a personal leave of absence. Thus, even assuming such a defense to reinstatement and backpay were cognizable, the Board found that the Respondent failed to meet its burden of proving that it would have lawfully discharged Turner because of her medical leave.

The Board also summarily rejected, based on credibility determinations and procedural reasons, the General Counsel's cross-exceptions to the judge's finding that Turner failed to mitigate her damages by seeking work during a particular portion of the backpay period and the General Counsel's requests that the Board re-order Turner's reinstatement and assert Turner's right to backpay beyond the litigated compliance period.

(Chairman Liebman and Member Schaumber participated.)

Adm. Law Judge Paul Buxbaum issued his supplemental decision Feb. 26, 2008.

#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Harco Asphalt Paving, Inc.* (Laborers Local 120) Indianapolis, IN, July 7, 2009. 25-CA-30652, et al; JD-30-09, Judge Mark D. Rubin.

Carpenters Local 43 and New England Regional Council (an Individual) Hartford, CT, July 7, 2009. 34-CB-3047; JD-28-09, Judge Wallace H. Nations.

*Bronx Heights Neighborhood Community Corp.* (SEIU Local 32BJ) Bronx, NY, July 8, 2009. 2-CA-38979; JD(NY)-28-09, Judge Eleanor MacDonald.

New York Gypsum Floors, Inc. (Teamsters Local 456) Mt. Vernon, NY, July 8, 2009. 2-CA-38952, 2-RC-23313; JD(NY)-27-09, Judge Raymond P. Green.

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#### NON-COMPLIANCE WITH SETTLEMENT AGREEMENT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's non-compliance with a settlement agreement.)

Fuel Systems, Inc. (Teamsters Local 710) (13-CA-44834; 354 NLRB No. 44) Chicago, IL, July 10, 2009. [HTML] [PDF]

Vishal Construction, Inc. (Laborers Local 79) (29-CA-28866, 28968; 354 NLRB No. 43) Jackson Heights, NY, July 8, 2009. [HTML] [PDF]

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### LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Sysco Seattle, Inc., d/b/a Sysco Food Services of Alaska, Anchorage, AK, 19-RC-15208, July 7, 2009 (Chairman Liebman and Member Schaumber)

Trustees of the Estate of Bernice Pauahi Bishop d/b/a Kamehameha Schools, Keaau, HI, 37-RC-4202, July 7, 2009 (Chairman Liebman and Member Schaumber)

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